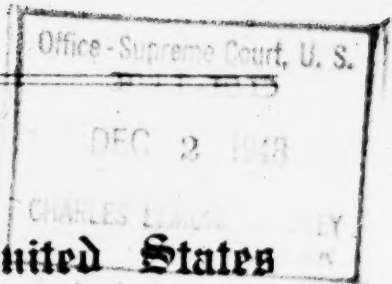


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SUPREME COURT, U. S.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~443~~ 15

MANUFACTURERS TRUST COMPANY,

Petitioner,

v.

**TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

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*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on the 5th day of August, 1948, affirming in part an order of the District Court of the United States for the Southern District of New York entered on December 12, 1947.

Opinion Below.

The opinion of the Court below was filed on the 5th day of August, 1948 (R. 29) and is reported in 169 Fed. 2d 922. The District Court of the Southern District of New York rendered no opinion.

Basis of Jurisdiction.

Jurisdiction is invoked under Sections 347, 349A and 350 of Title 28 of the United States Code.

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948. Application for extension of time to file an application for a writ of certiorari was made by petitioner to this Court and an order extending petitioner's time to file the application for a writ of certiorari until December 3, 1948 was entered on November 5, 1948.

Questions Presented.

The fundamental question presented in this petition is whether the Alien Property Custodian may vest the amount of the deposit balance standing to the credit of an enemy notwithstanding the assertion by the bank that due to its banker's right of setoff of a past due indebtedness it is not indebted to the enemy in any amount.

A corollary to this question is whether a bank's right of setoff is a matter of substantive right or a remedial right.

A further corollary to this question is whether in the face of the claimed setoff the Custodian may settle the accounts between the enemy depositor and the bank, determine that the bank is indebted to the enemy in a sum certain without any offset or counterclaim and vest the debt thus created and determined.

A further question presented is whether the bank's right to hold and apply the Reichsbank's deposit balance is a right in the nature of a security interest in property within the purview of Section 8(a) of the Trading with the Enemy Act.

Statutes Involved.

Sec. 5(b) (as amended by Title III War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 838, 50 U. S. C. App., Supp. V, 5(b)); Sec. 7, 40 Stat. 416 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020); Sec. 8(a), c. 106, Sec. 8, 40 Stat. 418; Sec. 9(a) as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511; Sec. 17, c. 106, Sec. 17, 40 Stat. 425 of the Trading with the Enemy Act as amended, 50 U. S. C. App. 1-31.

Executive Order No. 9193 (7 F. R. 1971), as amended by Executive Order No. 9567 June 8, 1945 (10 F. R. 6917).

Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981).

Statement.

The material facts are contained in the opinion of Swan, J. (R. 30).

On February 1, 1946 the Alien Property Custodian, hereinafter referred to as "Custodian", issued Vesting Order 5791 which described the property thereby vested as "that certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same". The vesting order made no determination as to the amount of the debt owing by the Manufacturers Trust Company, hereinafter referred to as "the Bank", to the Reichsbank.

At the time of the issuance of the vesting order the sum of \$25,581.49 stood to the credit of the Reichsbank's deposit account on the Bank's books. On the same date, and prior to the date of the vesting order, the Reichsbank was indebted to the Bank in excess of the aforesaid deposit balance as guarantor of past due obligations of various German banks. After receipt of the vesting order the Bank advised the Custodian that in view of the Reichsbank's indebtedness to it in excess of the deposit balance there was no balance available to the Reichsbank.

Thereafter, the Attorney General, as successor to the Custodian, issued a turnover directive wherein he determined that at the time of the issuance of Vesting Order 5791 the Bank owed the Reichsbank \$25,581.49 and that there are no valid offsets or counterclaims to the said sum. Upon the Bank's refusal to make payment of the \$25,581.49 the Attorney General instituted summary proceedings under Section 17 of the Trading with the Enemy Act to compel payment of said sum.

In the District Court petitioner contended that an order should not be made directing it to pay a debt found by the Custodian to be due to the Reichsbank upon the ground that it was not indebted to the Reichsbank in any sum at the time of the issuance of the vesting order and that the Custodian did not have the power to determine the existence and amount of the debt and to summarily compel payment thereof.

The District Court made an order directing the Bank to pay the said sum with interest from the date of the service of the turnover directive, from which order an appeal was taken to the United States Court of Appeals for the Second Circuit.

On the appeal to the United States Court of Ap-

peals for the Second Circuit petitioner contended that the Custodian has no power to compel payment of a disputed debt upon his *ex parte* determination as to the existence and amount thereof; that the validity and extent of the Bank's setoff may not be summarily determined in a proceeding under Section 17 of the Trading with the Enemy Act; and that the Court may not compel payment of the alleged debt until the existence and amount thereof is established by the Custodian in an independent proceeding.

The United States Court of Appeals for the Second Circuit affirmed so much of the order as directed the Bank to pay \$25,581.49 and modified so much of the order of the District Court as directed the payment of interest. The affirmance was based upon a holding that the Bank's assertion that it is not indebted to the Reichsbank because the Reichsbank was indebted to it in excess of the amount of the deposit balance as a guarantor of a past due obligation, was not a denial of an indebtedness but the assertion of a cross-claim which should be litigated in a proceeding instituted under Section 9 of the Trading with the Enemy Act.

Reasons for Granting Petition.

As the Court of Appeals pointed out, there is very little authority on the question of the power of the Custodian to vest a disputed debt and to compel its payment by a putative debtor. That question has not been decided by this Court.

On the aspect of the opinion dealing with the right of a bank to set off its depositor's balance against depositor's unmaturred obligation, the Court of Appeals departed from well accepted commercial usage and modern legal principles.

Both questions are of great importance to the commercial community and banks throughout the United States and have already evoked considerable inquiry and interest.

The vesting of a debt is, in effect, a garnishment of the putative debtor's property for the satisfaction of a debt allegedly due to an enemy. The Custodian's power under the Trading with the Enemy Act to vest debts is confined to debts whose validity and extent the debtor acknowledges. Whereas the Custodian may seize a chattel which he determines is held for an enemy, he may not lawfully seize property for the satisfaction of a disputed debt without first establishing the existence of the debt in a separate proceeding. *Simon v. Miller*, 298 Fed. 520.

In the majority opinion of the Circuit Court it is stated that the said Court would hesitate to hold that if the existence of a debt is denied by a putative debtor, the Custodian has the power to determine that there is a debt and the amount thereof and that such a determination is conclusive in a proceeding under Section 17 of the Trading with the Enemy Act (R. 32). In view of this holding the affirmance of the District Court's order directing the petitioner to pay \$25,581.49 to the Custodian cannot be based on the findings as to the existence and amount of the debt contained in the turnover directive but upon the Bank's admission that it is indebted to the Reichsbank in the sum of \$25,581.49 for the deposit balance. However, when the said statement was made by the Bank, the Bank also stated that the said balance is unavailable to the Reichsbank because the Reichsbank was indebted to the Bank on a past due obligation in a sum exceeding said balance.

The crucial phrase in the majority opinion of the

Court of Appeals in so far as the present controversy is concerned is that "a setoff at law is a money demand independent of and unconnected with the plaintiff's cause of action", that the "assertion by the Bank of a right of setoff is not a denial of the Reichsbank's claim for the amount on deposit", and that the Bank "must have recourse to Paragraph 9 to litigate its asserted setoff" (R. 32).

The decision of the Court of Appeals is in conflict with the modern, long recognized and established principle that a bank may at will at any time apply a deposit balance due from the bank to the depositor in payment of a past due obligation of a depositor.

A deposit in a bank creates a debtor and creditor relationship between the bank and the depositor and the bank may apply the deposit balance upon any obligation due it from the depositor. *Studley v. Boylston Nat. Bank of Boston*, 229 U. S. 523; *Strauss, et al. v. The Tradesmen's National Bank of New York*, 122 N. Y. 379, 382; *Falkland v. St. Nicholas Nat. Bank of N. Y.*, 84 N. Y. 145, 149.

The bank's right to apply the deposit balance in payment of a depositor's matured obligation arises from the contract implied from relationship of the parties and by operation of law (*Falkland v. St. Nicholas National Bank of New York*, 84 N. Y. 145), which stands upon the footing of a legal contract. *Poindexter v. Greenhow*, 114 U. S. 270, 300.

The New York courts have held that a bank may set off a deposit balance against a matured obligation for which the depositor is liable as a guarantor. *New York Title & Mortgage Co. v. Irving Trust Co.*, 241 App. Div. 246, aff'd 268 N. Y. 547; *Smith v. Eighth*

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Ward Bank, 31 App. Div. 6; *Van Schaick v. Pennsylvania Exchange Bank*, 236 App. Div. 453.

According to the modern view this right is a matter of substantive right and not of procedure. *First National Bank of Indianola v. Malone*, 76 Fed. 2d 251; *The Gloria*, 286 Fed. 188, 192; *Wisdom v. Guess Dry-cleaning Co.*, 5 Fed. Supp. 762. —

The bank's right of setoff is not limited in its exercise to the pleading of a counterclaim in an action but is enforceable by the bank's own act without the aid of a court. *Studley v. Boylston Nat. Bank of Boston*, 229 U. S. 523; *Gonzales v. Bank of America National Trust and Savings Association*, 16 Cal. 2d 169, 105 P. 2d 118; *Jefferson County National Bank v. Duskas*, 166 Misc. 720.

The practical effect of a setoff arising from the existence of mutual demands is the satisfaction of the cross demands leaving only whatever balance may be due on either as the true amount of the indebtedness from the one party to the other. *Bank of Marysville v. Marysville Windisch Mulhauser Brewing Co.*, 50 Ohio State 151, 33 N. E. 1054; *Long Beach Trust Co. v. Warshaw*, 264 N. Y. 331; *Commercial Bank of Albany v. Hughes*, 17 Wendel 94; *Ware, as Administrator v. Howley*, 68 1a. 63, 27 N. W. 788, 789.

The effect of the setoff is to decrease the bank's obligation to the depositor. If the depositor is, in fact, indebted to the bank, the bank may exercise its right of setoff; that the transaction is not on the books of the bank or that an official of the bank does not know of its existence is immaterial on the issue of

the indebtedness. *Walser v. International Union Bank*, 21 Fed. 2d 294, 296.

The Court of Appeals notwithstanding, the Bank did not admit any liability to the Reichsbank. While it admitted that as a result of deposits made a balance in the sum of \$25,581.49 stood to the credit of Reichsbank, it also stated in no uncertain terms that there was no debt due from it to the Reichsbank because of the Reichsbank's indebtedness to it in an even greater amount.

The District Court had no power to direct payment of the disputed debt and the affirmance of that part of the order by the Court of Appeals for the Second Circuit was erroneous. If the existence of an indebtedness is denied, the putative debtor cannot be compelled to pay the debts determined to be owing by the Custodian before the existence and the amount of such debt is judicially determined in a separate proceeding.

Section 8(a) of the Trading with the Enemy Act protects the right of a person having a right in the nature of security in property of an enemy. The bank's right to withhold the deposit balance and to apply it against any matured indebtedness owing to it by its depositor has been classified in many cases, including decisions of this Court, as a lien for the security and protection of the bank. *Falkland v. St. Nicholas National Bank of New York*, 84 N. Y. 145, 149; *Studley v. Boylston Nat. Bank of Boston*, 229 U. S. 523, 528.

The Custodian can have no greater right than the enemy depositor to demand repayment of a deposit balance allegedly due to a depositor and to enforce payment thereof. If the balance was unavailable to

the Reichsbank upon demand, it was likewise unavailable to the Custodian.

The Courts have at all times been solicitous to protect a bank's right to hold and apply the deposit balance. In no other proceeding has a bank been compelled to pay a deposit balance and to litigate its right to setoff thereafter. The decision of the Court below is contrary to the modern view of the bank's right of setoff as understood by the commercial community and by the Court.

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

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